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No. 87-704

In the Supreme Court of the United States

OCTOBER TERM, 1987

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY,
Petitioner,

vs.

BERNARD LITMAN,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

As we shall explain in the argument which follows, the petitioner's primary contention—that the "*Erie* doctrine" was violated by the court of appeals—has no colorable basis in the record. This case therefore presents neither of the two questions presented for review by the petitioner. The only legitimate question which could have been presented for review here is the question which was presented to and decided by the *en banc* court below, which we state as follows:

Whether a district court must obey an unambiguous mandate of a court of appeals where an appellant, in order to escape an adverse consequence of only partial success on appeal, has unilaterally stipulated after remand to a result contrary to the mandate.

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

The respondent, Bernard Litman, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Eleventh Circuit's *en banc* decision in this case.

STATEMENT OF THE CASE

The petitioner's statement of the case contains only a handful of minor inaccuracies. Under ordinary circumstances, we would simply correct those inaccuracies and

turn directly to the reasons why certiorari should be denied. We are unable to do that, however, for several reasons. First, the minor inaccuracies have been coupled with selective omission to present a subtly distorted picture of our position below, as well as the court of appeals' ultimate endorsement of it. Second, the petitioner has purposefully blurred the quite separate issues presented in the two different appeals below, in order to manufacture a foundation for one of the questions presented for review—a foundation which, in our judgment, does not exist. And finally, the argument constructed upon the statement of the case contains some additional inaccuracies which need to be corrected before we can properly respond to the petitioner's petition. We therefore deem it prudent to restate the case here briefly for the general reorientation of the Court.[1]

The respondent, Bernard Litman, was the plaintiff below in a three-count action against the petitioner, defendant below, Massachusetts Mutual Life Insurance Company. The three counts involved a single claim for breach of contract, and two claims for separate defamatory statements made by agents of the defendant. The action was tried to a jury, which returned a verdict for Mr. Litman on all three counts. The verdict included an undifferentiated punitive damage award of $250,000.00 for the two slanders. After judgment was entered on the verdict, the defendant declined to pay any portion of it—and the judgment was appealed to the court of appeals. Among other things, the defendant contended there that

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1. Like the petitioner's statement of the case, our brief restatement of the case will be bottomed upon the face of the decisions contained in the petitioner's appendix, so we will not trouble the Court with unnecessary references to the underlying record.

the punitive damage award was excessive, and it requested a new trial on the issue of punitive damages. It also challenged the legal propriety of both of the slander awards.

The plaintiff did *not* contend on appeal that the punitive damage award was inadequate, and he did not ask for a new trial on the issue of punitive damages. Neither did the defendant contend that Florida law prohibited the court of appeals from ordering the new trial on punitive damages which it had affirmatively requested, nor was the "*Erie* doctrine" (upon which the defendant now predicates its request for further review) ever mentioned in the court of appeals. The court ultimately held, *inter alia*, that the punitive damage award was not excessive, and that no new trial was required for that reason, but that one of the slander awards was legally improper —and it reversed the plaintiff's judgment for compensatory damages on that claim. As a *consequence* of that reversal (because the punitive damage award was undifferentiated), a new trial was ordered on the issue of the amount of punitive damages owing to the plaintiff for the other slander claim upheld by the court.[2]

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2. In an effort to shade its position somewhat here, the defendant has characterized the relief ordered as a "right" which belonged to it, and not to the plaintiff. We prefer to characterize the relief as an "adverse consequence" of the defendant's only partial success on appeal. In the final analysis, of course, these labels are merely semantic devices, and neither of them can change the fact that the new trial was ordered as a consequence of the failure of the verdict form to differentiate between the punitive damage awards for the separate slanders. The court of appeals also made it clear in the second appeal that the result it reached was bottomed upon the substance of what occurred, rather than upon any distinction between "right" and "consequence", so the court need not attach any significance to the different labels which the parties have selected to characterize the relief ordered in the first appeal.

The court of appeals' opinion (and therefore the mandate accompanying it) plainly and unambiguously stated three times that the district court was to conduct a *new trial* on the issue of punitive damages on remand:

> . . . Accordingly, we hold that the issue of punitive damages, damages which were in part based upon such slander, must be returned to the district court for a new trial. . . .
>
> . . . However, in view of our reversal of the slander award based upon the statements of James Martin, we must remand the punitive damage issue to the district court for a new trial. This result is inavoidable [sic]. . . .
>
> . . . We likewise hold that the award of punitive damages must be reversed and the issue remanded for a new trial. . . .

Litman v. Massachusetts Mutual Life Insurance Co., 739 F.2d 1549, 1552, 1562 (11th Cir. 1984).

Upon remand, however, the district court did not conduct a new trial on the issue of punitive damages. In fact, it flatly refused to conduct a new trial on the issue—and reentered that portion of the final judgment which had previously been reversed by the court of appeals. The impetus for this ruling was the defendant's post-appeal recognition that the adverse consequence of its only partial success on appeal—the retrial of the punitive damage issue (which it had affirmatively requested from the court in connection with another issue on appeal)—was exceptionally risky. To avoid this belatedly-recognized risk, it stipulated in the district court that it would pay the punitive damage award reversed by

the court of appeals, rather than face the new trial ordered by that court. Over the plaintiff's objection that the district court had no authority to violate the court of appeals' mandate in that fashion, the district court complied with the defendant's request. Convinced that the district court's order improperly allowed the defendant to manipulate the final result in the case by "accepting" the benefit of its appeal and "waiving" its adverse consequence, in a manner directly contrary to the court of appeals' mandate, the plaintiff appealed and sought enforcement of the mandate.

It was not until this second appeal that the defendant asserted that Florida law prohibited a plaintiff from obtaining a new trial for an inadequate punitive damage award. (Although this may have been an indirect assertion of the "*Erie* doctrine", *Erie* itself was never cited in the defendant's briefs.)[3] This position was not asserted for the proposition that the court of appeals had committed error in its disposition of the first appeal, however, nor could it have been properly asserted for that proposition,

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3. *Erie* was mentioned only once, and then only in passing in the defendant's supplemental brief on rehearing, where it was offered as justification for the initial panel's majority opinion: "The panel majority simply concluded, as they were *Erie*-bound to do [etc.]" (supp. brief, p. 19).

The failure of the defendant to argue *Erie* in either appeal is an obvious answer to the feigned puzzlement expressed in footnote 8 of the defendant's petition: "Interestingly, despite the clear variance from controlling state law, the court of appeals makes no reference to the obvious *Erie* implications of its result." There is a better answer to this rhetorical footnote, however. As we shall demonstrate in the argument which follows, there was simply no "variance from controlling state law" which would have justified discussion of any "*Erie* implications". Moreover, even a cursory reading of the court of appeals' decision will reveal that the majority was careful to follow and apply Florida law on every substantive issue discussed.

since it had never been asserted in the first appeal. (That, however, is essentially what the defendant has argued here under the first question presented for review.) Instead, this position was asserted in support of the defendant's argument that the district court could legitimately disregard the express command of the court of appeals' mandate by "interpreting" it to conform to the requirements of Florida law. (That is essentially what the defendant has argued here under the second question presented for review—and we take it to be self-evident that that question is considerably different than the first.)[4]

The panel which initially heard the appeal affirmed the district court's order (with one judge dissenting). *Litman v. Massachusetts Mutual Life Insurance Co.*, 791 F.2d 855 (11th Cir.), *vacated*, 798 F.2d 1355 (11th Cir. 1986), *overruled on rehearing*, 825 F.2d 1506 (11th Cir. 1987) (*en banc*). This decision can be disregarded here, however, because it was subsequently vacated when the court of appeals granted the plaintiff's suggestion for *en banc* rehearing. *Litman v. Massachusetts Mutual Life Insurance Co.*, 798 F.2d 1355 (11th Cir. 1986), *on rehearing*, 825 F.2d 1506 (11th Cir. 1987) (*en banc*).

The majority's opinion on rehearing speaks well enough for itself, of course, but it is worth noting that the defendant's primary contention here—that the "*Erie* doc-

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4. The defendant also argued that the district court's ruling was permissible because it resolved a "new issue" not embraced by the mandate, and that contention has been resurrected here as if it were fact. The majority expressly rejected this contention, however, and not even the dissenters endorsed it (since even they acknowledged that the district court's ruling was inconsistent with the mandate). Like *all* of the judges below, we think it is simply indisputable that the defendant's post-appeal maneuver did not present a "new issue" not embraced by the mandate.

trine" was violated by the court of appeals' disposition of the first appeal, and by its refusal to allow the district court to change that disposition thereafter—was dispatched essentially as follows: the new trial on punitive damages ordered by the court in the first appeal was not ordered at the request of the plaintiff, nor was it ordered to correct an inadequate punitive damage award, so it did not violate Florida law; the new trial was an unavoidable adverse consequence of the defendant's only partially successful appeal; and, once the initial punitive damage award had to be reversed, the only proper outcome under Florida law was a new trial on punitive damages. The court also held, of course, that the district court had violated its mandate by refusing to conduct the new trial which it had initially ordered. *See Litman v. Massachusetts Mutual Life Insurance Co.*, 825 F.2d 1506 (11th Cir. 1987) (*en banc*). We will explain the propriety of both of these rulings in the argument which follows.

REASONS WHY THE PETITION SHOULD BE DENIED

1. The first question presented for review was not preserved for review.

We intend to demonstrate in the next subsection that the court of appeals did even arguably violate the "*Erie* doctrine" in either of the two decisions which form the backdrop for the defendant's complaints here. Initially, however, we think it important that the Court understand that the first question which the defendant has presented for review is simply unreviewable here. According to the defendant's first argument, the court of appeals vio-

lated the "*Erie* doctrine", not in the decision which it seeks to have reviewed, but in its first decision, when it initially mandated a new trial on the issue of punitive damages. We do not doubt the Court's ability to reach back at this juncture, examine the issues presented in the first appeal, and correct any errors committed there. *See, e. g., Mercer v. Theriot,* 377 U.S. 152 (1964). Before the Court can do that, however, the issue which the defendant seeks to have resolved here must have been presented to the court of appeals in the first appeal. *See, e. g., Delta Air Lines, Inc. v. August,* 450 U.S. 346 (1981); *Adickes v. S. H. Kress & Co.,* 398 U.S. 144 (1970).

Clearly, the first question presented for review here was not presented to the court of appeals in the first appeal. The defendant never argued in the first appeal that Florida law prohibited the court from ordering a new trial on the issue of punitive damages. In fact, it argued exactly the opposite—that Florida law required a new trial on the issue because the punitive damage award was "excessive". The court of appeals rejected that contention, but found it necessary to order a new trial on the issue nevertheless, for a different reason. The defendant neither complained of this disposition in its motion for rehearing, nor otherwise sought any relief from it in the court of appeals. In short, not a word was ever expended in the first appeal on the "*Erie* doctrine", or anything like it.

It was not until after remand that the defendant decided to raise the issue by attempting to "waive" the adverse consequence of its only partially successful appeal—asking the district court, in effect, to square the final result in the case with the defendant's reading of Florida law by refusing to conduct the new trial ordered by the court of appeals. The propriety of the district court's ruling on

that quite different issue, as well as the court of appeals' reversal of it in the second appeal, may well be reviewable here under some modified form of the second question presented for review (or the alternative question stated at the outset of this brief). However, the first question presented for review was never presented below in any manner, shape, or form—and it is therefore simply unreviewable here.

2. Neither of the two questions presented for review has any colorable basis in the record.

In any event, both of the questions presented for review here are bottomed upon a single broad assertion (repeated over and over again in numerous variations)—that the new trial on punitive damages to which the defendant must now submit is prohibited by Florida law, and that the bottom line of the decision below therefore violates the "*Erie* doctrine". We disagree. Of course, we concede the cornerstone of that argument—that Florida law prohibits a plaintiff from challenging a punitive damage award as "inadequate" and obtaining a new trial on that ground. *St. Regis Paper Co. v. Watson,* 428 So.2d 243 (Fla. 1983). But to concede the cornerstone is not to concede the remainder of the edifice constructed upon it. In this case, the plaintiff did not challenge the initial punitive damage award as "inadequate", and the new trial was not ordered on that ground—so the principle of *St. Regis Paper Co.* was not even arguably violated by the court of appeals' initial mandate.

While that is the short and simple answer to the defendant's essential contention, the contention can be answered in a slightly more elaborate but equally dis-

positive way, by demonstrating the converse—that the court of appeals' initial mandate was also perfectly consistent with (indeed, that it was required by) Florida law. Although *St. Regis Paper Co.* prevents a plaintiff from challenging a punitive damage award as "inadequate", Florida law clearly does not prevent a *defendant* (or a plaintiff, for that matter) from challenging any error which may have impermissibly affected a punitive damage award, and new trials limited to the issue of punitive damages are clearly authorized. *See, e. g., Bankers Multiple Line Insurance Co. v. Farish,* 464 So.2d 530 (Fla. 1985); *Arab Termite & Pest Control, Inc. v. Jenkins,* 409 So.2d 1039 (Fla. 1982); *Wackenhut Corp. v. Canty,* 359 So.2d 430 (Fla. 1978); *Hartford Accident & Indemnity Co. v. Ocha,* 472 So.2d 1338 (Fla. 4th DCA 1985); *Rabren v. Straigis,* 498 So.2d 1362 (Fla. 2nd DCA 1986); *Stephens v. Rohde,* 478 So.2d 862 (Fla. 1st DCA 1985), *review denied,* 488 So.2d 832 (Fla. 1986).

That, of course, is what happened in the instant case. The *defendant* appealed, and it challenged, among other things, the legality of the plaintiff's recovery of damages for the two slanderous statements proven to the jury's satisfaction. The court of appeals upheld that challenge in part, concluding that one of the slanderous statements was privileged as a matter of law, and that the plaintiff could therefore recover no damages for it. It was simple enough at that point to set aside the jury's separate award of compensatory damages for the privileged statement, but the undifferentiated punitive damage award for both slanderous statements presented a more difficult problem. Following settled federal law governing this oft-recurring procedural problem (*see* the decisions cited in footnote 10 of the majority's opinion below), the court

reversed the now only partially-supported punitive damage award and remanded for a new trial on the issue.[5]

As we have previously noted, the defendant did not challenge this disposition as contrary to Florida law in the court of appeals. If it had, however, it would have been wrong—because Florida procedural law required precisely the same result. A good example can be found in *Flagship National Bank v. Gray Distribution Systems, Inc.*, 485 So.2d 1336 (Fla. 3rd DCA), *review denied*, 497 So.2d 1217 (Fla. 1986). In that case, as in this case, the plaintiff recovered compensatory and punitive damages on multiple counts, but the punitive damage award was not apportioned between the two causes of action for which punitive damages had been assessed. In that case, as in this case, the defendant appealed, and successfully asserted its entitlement to judgment on one of the causes of action for which punitive damages had been awarded.

Faced with the identical dilemma faced by the court of appeals in this case, the Florida court resolved it in precisely the same way:

> Addressing the trial court's award of damages, we find that the trial court awarded damages on three counts without specifying the amounts attributed to breach of contract, to Flagship's failure to dispose of collateral in a commercially reasonable manner, and to Flagship's improper conduct in obtaining the

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5. Since this was a procedural ruling, rather than a ruling upon an issue of substantive law, we doubt that it even implicates the "*Erie* doctrine". There is no need for us to debate that point, however, since the ruling (however it is characterized) was clearly consistent with Florida law, as we shall demonstrate momentarily.

> settlement agreement. The trial court also failed to apportion the punitive damages between the counts addressing the breach of contract and the settlement agreement. Our holding that Flagship did not breach its contract vitiates any award of either compensatory or punitive damages on that ground. Under the trial court's prior judgment, however, Flagship remains liable on the settlement agreement count for compensatory and punitive damages. . . . Because we are unable to determine what portion of the damage awards is attributable to the count pertaining to the settlement agreement, we remand for a new trial on this issue. . . .
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> . . .
>
> For these reasons, we hold as a matter of law that no breach of contract occurred, and that accordingly, Gray is not entitled to recover either compensatory or punitive damages predicated on that ground. We remand for a new trial to enable the court: . . . to determine the amount of compensatory and punitive damages to which Gray is entitled for Flagship's improper procurement of the settlement agreement . . . .

485 So.2d at 1341, 1342.

This decision is only representative. There are others, which need not be belabored. *See, e. g., Montgomery Ward & Co., Inc. v. Hoey,* 486 So.2d 1368 (Fla. 5th DCA), *review denied,* 494 So.2d 1151, 1152 (Fla. 1986); *Uvanile v. Denoff,* 495 So.2d 1177 (Fla. 4th DCA 1986), *review dismissed,* 504 So.2d 766 (Fla. 1987). The point is simply that the court of appeals' disposition of the first appeal was perfectly consistent with Florida law, and not even arguably in violation of it. As a result, the defendant's

contention that the "*Erie* doctrine" was violated by the court of appeals does not raise even a colorable issue in this case. The questions presented for review are therefore so clearly without merit that certiorari should be denied as to both.

3. The court of appeals' decision is correct.

Once the questions presented for review are stripped of their clearly erroneous assertions that the court of appeals violated the "*Erie* doctrine", none of the reasons set forth in Rule 17 as touchstones for review by certiorari is even arguably implicated by the court of appeals' decision. The defendant does not even bother to assert conflict with any decisions of this Court or other courts of appeal, nor does it assert that the decision presents an important question of federal law which has not been, but should be, settled by this Court. The reasons for the absence of these assertions should be obvious from the face of the majority's opinion. The defendant *does* assert that the court of appeals "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." However, this assertion is half-hearted (and, in large part, merely a variation upon its "*Erie* doctrine" theme), and it amounts to little more than an assertion that the court of appeals made a mistake in applying settled principles of law to the unique facts in this case. And, to the extent that *that* contention is lurking between the lines of the defendant's extended argument upon the "*Erie* doctrine", we think it is clearly wrong.

In the final analysis, the decision of the court of appeals announces nothing which has not already been

thoroughly settled by this Court. This Court long ago emphasized that an appellate court's mandate is sacrosanct, and that an inferior court "cannot vary it, or examine it for any other purpose than execution; or give any other or further relief; or review it, even for apparent error, upon any matter decided upon appeal; or intermeddle with it, further than to settle so much as has been remanded." *In Re Sanford Fork & Tool Co.*, 160 U.S. 247, 255 (1895). *See Ex parte Sibbald v. United States*, 37 U.S. 488 (1838); *Briggs v. Pennsylvania Railroad Co.*, 334 U.S. 304 (1948); *United States v. Haley*, 371 U.S. 18 (1962); *Stanton v. Stanton*, 429 U.S. 501 (1977); *Vendo Co. v. Lektro-Vend Corp.*, 434 U.S. 424 (1978).

It would also appear to be settled that a mandate is a mandate is a mandate—and when an inferior court has been directed by a superior court to proceed upon remand in a specific manner, the specific requirements of the mandate cannot be avoided by any unilateral act of a party following remand, like the unilateral stipulation by which the defendant sought to avoid the court of appeals' mandate in the instant case. *See, e. g., Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129, 136 (1967) ("The Department of Justice, however, by stipulation or otherwise, has no authority to circumscribe the power of the courts to see that our mandate is carried out. No one, except this Court, has authority to alter or modify our mandate."); *Utah Public Service Commission v. El Paso Natural Gas Co.*, 395 U.S. 464 (1969) (same); *United States v. E. I. du Pont de Nemours & Co.*, 366 U.S. 316, 325 n. 6 (1961) ("But plainly . . . no stipulation by the Government could circumscribe

this Court's power to see that its mandate is carried out.").

Finally, it would also appear to be settled that, once a jury verdict which is tainted on an issue must be entirely set aside in favor of a new trial, it cannot remain in the wings subject to unilateral reinstatement by a party, or as a contingent limitation upon (or to be satisfied as an alternative to) the second jury's *de novo* review of the facts: when a new trial is ordered, the case "goes back to the trial court and there stands on the issues as if the former trial had not taken place." *Roth v. Hyer*, 142 F.2d 227, 229 (5th Cir.), *cert. denied*, 323 U.S. 712 (1944). *See Gospel Army v. City of Los Angeles*, 331 U.S. 543, 547 (1947) (reversal for a new trial "places the parties in the same position as if the case had never been tried").[6]

The court of appeals' decision is perfectly consistent with all of these settled general principles governing the particular issue presented here, and it is therefore facially correct. At the very least, the settled existence of these consistent general principles of law precludes a conclusion here that the court of appeals "so far departed from the accepted and usual course of judicial proceedings" as to require the exercise of this Court's general power of supervision. Since none of the remaining "Considerations Governing Review on Certiorari" set forth in Rule 17 is even arguably implicated by this case, we respectfully submit that it is not a proper case for the extraordinary intervention of this Court.

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6. Additional decisions on this point are collected in footnote 12 of the majority's opinion below.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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